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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 152

SOUTHERN PINE ELECTRIC COOPERATIVE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* order of the court below, enforcing without opinion the order of the National Labor Relations Board (Pet. 1a), is reported at 218 F. 2d 824. The findings of fact, conclusions of law, and order of the Board (R. 60-100)[1] are reported at 104 NLRB 834.

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[1] The symbol "R." refers to the Transcript of Record printed as Volume I pursuant to the rules of the court below; the symbol "B.A." refers to the appendix to the brief filed by the Board in the court below.

JURISDICTION

The judgment of the court below was entered on February 4, 1955 (Pet. 1a-2a). A petition for rehearing was denied on March 22, 1955 (Pet. 2). The petition for a writ of certiorari was filed on June 14, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the Board's new jurisdictional standards, announced by the Board after the institution of these proceedings in the court below, should be applied, contrary to the Board's express policy, to cases decided by the Board under the pre-existing jurisdictional standards.

2. Whether employees who act in concert to demand a wage increase and threaten to quit if their demands are not met are engaging in "concerted activities for . . . mutual aid or protection" within the meaning of the Act.

3. Whether the Board's finding that petitioner at the time it refused to bargain did not have a good faith doubt of the union's majority, is supported by substantial evidence.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in Appendix C of the Petition (Pet. 2a-4a).

STATEMENT

I. The Board's Findings of Fact

A. *The nature of petitioner's business*

Petitioner, a nonstock, nonprofit Alabama cooperative, purchases at wholesale and sells at retail electrical energy to 6,800 members, including rural farmers, several municipalities, and several industrial enterprises (R. 73; 117, B.A. 3-4, 176, 212-217). During 1951, petitioner made purchases amounting to more than $260,000, of which over 14 percent was purchased outside Alabama (R. 73-74; 117-118, B.A. 3-4). During the same period, petitioner sold power valued in excess of $350,000, all of it to purchasers within the State, including industrial users engaged in operations affecting commerce (R. 73; 114, 118, B.A. 3, 212-217). Petitioner has been financed by loans from the Rural Electrification Administration, a division of the Department of Agriculture, amounting to one and one-half million dollars (R. 74; 114, 118, B.A. 4, 192-195).

Acting under its then existing jurisdictional standards, the Board found that petitioner was engaged in commerce within the meaning of the Act and that it fell "within the class of enterprise over which the Board, as a matter of policy, asserts its jurisdiction" (R. 74-75).

B. *The illegal discharges*

1. The employees act in concert to demand a wage increase

On January 16, 1952, several of petitioner's employees expressed dissatisfaction with their wage rates (R. 76; B.A. 7-9, 61, 98, 218, 242). Employees Pugh and Taylor told petitioner's president that the employees "might walk out and close the place down" if their wages were not increased (R. 76; B.A. 37-38). That evening, Pugh and Taylor, together with four other employees,[2] told Assistant Manager Arnold that they were "dissatisfied," and that they were "going to see Mr. Larkins [the manager] and see what he could do about it" (R. 76; B.A. 10, 76, 168).

The next morning, January 17, the six employees who had complained to Arnold met together and "decided to go in and talk to Mr. Larkins, see what could be worked out on the pay raise situation" (R. 76-77; B.A. 39). Employee Phelps, who was also present at the meeting, told them, "I am a lot older than any of you out here and it is harder and more difficult for me to get a job; and as far as quitting, I can't do that" (R. 76; B.A. 63-64, 43, 86). Taylor assured him, "why, * * * nobody is quitting. We are just going in and see what he means by giving some no raise at all and some eight-tenths of one cent" (R. 77; B.A. 64, 43).

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[2] Bradley, Freeman, Holloway, and Jordan. These four, together with Pugh, Taylor, and a seventh employee, Phelps, are the employees whose subsequent discharge is at issue here.

Phelps and the other six employees then entered Larkins' office together (R. 77; B.A. 10-11, 62, 76, 219-220, 244). Taylor "told Larkins that we had come in there to talk to him. We were dissatisfied about the pay raise." When Larkins stated that he "wouldn't talk to [them] as a group but [would] talk to [them] one at a time," Taylor replied that "if [Larkins] talked with one, he would talk with all of them, we was in there as a group and we would stay as a group" (R. 77; B.A. 11-12, 62, 77, 99-100, 181, 197, 245, 254). After some discussion of the pay increases, Taylor stated, "if something couldn't be done by the first of the month, we was working two-weeks notice" (R. 77-78; B.A. 12, 40).

2. Petitioner discharges the 7 employees who had demanded a wage increase

All of the employees worked on January 18, 21, and 22, the three working days following their threat to resign (R. 79; B.A. 40-41, 171). On the morning of January 22, after consulting his attorney, General Manager Larkins told his timekeeper that he "was going to let [these seven employees] go and give them full time all the way through the rest of the month" in order to "give them time to get a job some place else" (R. 79; B.A. 50-51, 183). Shortly before quitting time Larkins offered pay checks to the employees who had threatened to quit in support of their wage demand (R. 79-80; B.A. 25-26, 92-93, 104). All of the employees refused to accept them; Pugh and Taylor pointed out that the weather looked bad and that they should be

available for emergency service, but Larkins instructed them to put their trucks into the garage instead of taking them home to make emergency calls, as was their usual practice (R. 80; B.A. 26-27, 104-105, 184). So far as the record shows—and petitioner makes no claim to the contrary—the discharged employees had been doing as good work since their threat to quit as they had before. They admittedly included some "very good employees" (B.A. 170-171).

3. The Board's conclusions with respect to the discharges

The Board found that in demanding a wage increase and threatening to quit unless they received one, the seven employees engaged in a concerted activity for mutual aid or protection within the meaning of Section 7 of the Act, so that petitioner's action in discharging them for engaging in that activity violated Section 8(a)(1) (R. 61-62).

C. *The refusal to bargain and the refusal to reinstate*

1. The IBEW obtains a majority in the plant, and petitioner is apprised of that fact

On January 19 and 20, 14 of the 18 employees in a unit of petitioner's employees, stipulated to be appropriate for purposes of collective bargaining, signed a paper and cards authorizing the IBEW to represent them (R. 85; 17, B.A. 5, 21, 267-280). They told the IBEW to seek a bargaining confer-

ence with petitioner, which the IBEW did by registered letter dated January 21 (R. 85; B.A. 117-118, 282-284).

Larkins opened the IBEW's letter on the evening of January 22 (R. 80, n. 13; B.A. 117-118, 155, 185-186, 282-284). Shortly thereafter, employee White, whom the Union members had selected as their spokesman, informed Larkins by telephone that he was speaking on behalf of 14 of petitioner's 18 employees, and made an appointment with Larkins for the following morning to discuss the discharges (R. 80; B.A. 43-44, 134, 186-187).

The 14 employees waited in Larkins' office from about eight o'clock the following morning until Larkins' arrival in the middle of the afternoon (R. 81; B.A. 29, 53, 93, 172, 183). Upon entering the room, Larkins inquired, "What do you call this—a strike or what?" White replied, "You name it" (R. 81, n. 15; B.A. 30, 41, 69, 115, 135-136, 188). White then asked Larkins "if he would consider putting them seven men back to work"; Larkins replied that "he considered those seven men no more employees of Southern Pine Cooperative" (R. 81; B.A. 30, 41, 54, 82, 107). Larkins asked White to let him know by seven o'clock that evening whether the remaining seven union members were returning to work, so that he could give full information to the Board of Directors concerning the situation (R. 81; B.A. 30, 54).

2. Petitioner refuses to reinstate the discharged employees

On the morning of January 25, all 14 members of the IBEW went down to petitioner's plant (R. 82; B.A. 189). White asked Larkins "wouldn't he reconsider and give those seven boys a chance to go back to work, they had to live" (R. 82; B.A. 138, 33, 56-57, 189). Larkins replied "that as far as he was concerned, they wasn't employed by the cooperative any more" (R. 82; B.A. 138, 139). He then gave final pay checks to the seven discharged employees, who gathered their personal effects and left the plant (R. 82-83; B.A. 109, 33, 189).

Larkins "wanted to know if that seven that wasn't off, was they going back to work and he told them to come up to his office and let them know if they was" (R. 83; B.A. 33). All employees who had not been discharged lined up in front of Larkins' desk (R. 83; B.A. 57, 139). Larkins asked each in turn if he were ready to return to work; each replied that he was (*id.*). One of the employees inquired "if there would be * * * any ill will held against [him] for participation in this union" or if there would be "hard times in any way about what happened" (R. 83; B.A. 57, 139, 158). Larkins did not reply (R. 82; B.A. 58, 139).

3. The refusal to bargain

By letter to the IBEW dated February 1 and signed by General Manager Larkins, petitioner expressed doubt as to the IBEW's majority status

and further asserted that it was not engaged in commerce within the meaning of the Act (R. 86; B.A. 119, 285, 286). On February 8, the IBEW wrote to Larkins requesting the reinstatement of the discharged employees and a bargaining meeting (R. 86; 123, 125, 287-288, 291-292). By letter dated February 22, petitioner by its attorney asserted for the first time that the employees had "resigned," asserted that "it could not grant your request for reinstatement of the employees unless it recognized your union as the bargaining agent for its employees," and further stated (R. 87-88; B.A. 126, 295-296):

> The cooperative * * * denies that it has refused to bargain collectively with your local union and refers you to its former correspondence in which it advised you that it was not convinced that you represented a majority of its employees, and further that it was not convinced that it conducts a business which affects commerce within the meaning of the Labor Management Relations Act.

While the IBEW was still actively seeking to induce petitioner to grant recognition, petitioner made substantial changes in its wage policy without consulting the IBEW (R. 91; B.A. 148-149). Thus, prior to July 1951, petitioner paid the employees required to hold themselves available over the weekend for emergency service only for time during which they actually worked; however, after that time they were given a few hours' pay at time

and a half whether or not they actually worked in addition to being paid for any time worked in excess of four hours (R. 91; B.A. 139-140, 159-160, 191-192). Before July 1951 the employees were paid a varying overtime rate which decreased as the number of hours worked during the week increased (R. 91; B.A. 139-140, 159); after that time petitioner paid them a fixed overtime rate (R. 91; B.A. 139-140, 146-147, 159).

4. The Board's conclusions with respect to the refusal to bargain

The Board found that the IBEW represented a majority of the employees in an appropriate unit, and that petitioner had no *bona fide* doubt of that fact. Accordingly, the Board concluded that petitioner by refusing to recognize the Union and by altering the employees' overtime and standby pay without consulting the Union violated Section 8 (a)(5) and (1) of the Act (R. 62).

II. The Board's Order and the Decision of the Court Below

The Board's order (R. 62-69) requires petitioner to cease and desist from the unfair labor practices found, and from in any other manner interfering with their organizational rights. Affirmatively, petitioner is required to offer reinstatement to the discharged employees whom it has not yet reinstated; to make all of the discharged employees whole for any loss of pay they may have suffered

by reason of the discrimination against them; upon request to bargain collectively with the IBEW; and to post appropriate notices.

The court below enforced this order without opinion.

ARGUMENT

1. After proceedings had been instituted in the court below, the Board announced in *Greenwich Gas Co.*, 110 NLRB No. 91, that it would no longer assert jurisdiction over public utility systems whose annual gross value of business is less than $3,000,000. Petitioner's contention (Pet. 9) that the court below erred in enforcing the Board's order after the change in jurisdictional standards, and its allied contention that the decision below conflicts with that in *National Labor Relations Board* v. *National Gas Co.*, 215 F. 2d 160 (C.A. 8), present the identical questions which this Court declined to review in *Thomas Rigging Co.* v. *National Labor Relations Board*, 348 U.S. 871, rehearing denied, 348 U.S. 932, denying certiorari in 211 F. 2d 153 (C.A.9), and *Homedale Tractor & Equipment Co.* v. *National Labor Relations Board*, 348 U.S. 833, denying certiorari in 211 F. 2d 309 (C.A. 9). As we stated in opposing certiorari in those cases, the *National Gas* decision appears to turn on the circumstance, not present here, that the Board, prior to the announcement of new jurisdictional standards, had "overruled" its own decision in *National Gas* as an "unwarranted extension" of its then controlling jurisdictional policy (*Brooks*

Wood Products, 107 NLRB 237, 238).[3] Moreover, subsequent to the Eighth Circuit's decision in *National Gas,* this Court in *Brooks* v. *National Labor Relations Board,* 348 U.S. 96, affirmed the enforcement of a Board bargaining order notwithstanding a notation in this Court's opinion that the case, if now brought, would fall outside the Board's "new jurisdictional yardsticks" (p. 104, n. 16).[4]

Finally, the Board has itself expressly indicated that its new jurisdictional standards, which were promulgated "upon consideration of the . . . Board's statutory obligation to effectuate [the statutory] purposes in relation to its total volume of cases and available funds and personnel," are not applicable to "cases in which a [Board] Decision and Order has already issued." *Edwin D.*

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[3] See the briefs in opposition in *Thomas Rigging,* No. 329, October Term, 1954, p. 12 and in *Homedale Tractor,* No. 239, October Term, 1954, p. 13. See also the brief in opposition in *Dixie Terminal Co.* v. *National Labor Relations Board,* No. 540, October Term, 1954, pp. 6-7, certiorari denied, 348 U.S. 952.

[4] Contrary to petitioner's contention (Pet. 16-17), this Court in *Garner* v. *Teamsters Union,* 346 U.S. 485, expressly left open the question whether relief against union misconduct might be sought in state courts in a situation in which "the federal Board would decline to exercise its powers once its jurisdiction was invoked." 346 U.S. at 488. See also *Building Trades Council* v. *Kinard Const. Co.,* 346 U.S. 933.

As to petitioner's contention that a new determination of employee representatives would not be made under the Act, petitioner suffers no prejudice therefrom for, after complying with the decree, it would be free to assert a subsequent loss of majority as grounds for discontinuing its recognition of the Union.

Wemyss, 110 NLRB No. 134, 35 LRRM 1131, 1132.[5] Cf. *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 383 (C.A. 9), certiorari denied, 341 U.S. 909, stating that: "Providing the Board acts within its statutory and constitutional power, it is not for the courts to say when that power should be exercised." See also, *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 78 (C.A. 5), certiorari denied, 341 U.S. 950. As the Sixth Circuit recently stated, ". . . it is the rule that a change in the policy of the Board does not require its application to the disposition of cases theretofore decided by it, and cannot be availed of by a respondent against whom an order has been entered prior to the adoption of such policy." *National Labor Relations Board* v. *Armco Drainage & Metal Products Co.*, 220 F. 2d 573, 584.[6]

2. The conclusion of the Board and the court below that petitioner unlawfully discharged seven employees for their concerted activity in demanding a wage increase presents no issue warranting review by this Court. A concerted demand for a wage increase is manifestly a "concerted activit[y] for the purpose of . . . mutual aid or protection" within the meaning of Section 7, and does not lose its protected character because it is accompanied

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[5] The *Wemyss* case, decided after the Eighth Circuit's decision in *National Gas* which attributed to the Board an intent to apply the new standards to cases then pending in the courts, expressly disclaimed any such intent.

[6] Petitioner's recognition (Pet. 13-15) that the Board might again change its jurisdictional standards so as to assert jurisdiction over petitioner affords no basis for granting the writ.

by a threat to strike or to quit if the demand is not granted. The Board's decision in *Crescent Wharf and Warehouse Co.*, 104 NLRB 860, relied on by petitioner (Pet. 19-21), is plainly distinguishable. In that case the employees actually resigned, whereas in the instant case they merely accompanied their wage demand with a threat of a future resignation. Since the "motive" for petitioner's discharge of these employees was reprisal against their protected concerted activity in presenting a wage demand and threatening to quit, there is no substance to petitioner's argument (Pet. 21-22) that the record fails to establish unlawful motivation. Cf. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 45.[7]

3. Petitioner's claim (Pet. 22-23) that it was entitled to an election before being required to bargain with the Union rests on the factual premise that its refusal to bargain was "motivated by a good faith doubt as to the union's majority" (Pet. 22). The Board's finding that petitioner had no such good faith doubt raises no question warrant-

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[7] In any event, the "test of interference, restraint and coercion * * * does not turn on the employer's motive." *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7); see also, *National Labor Relations Board* v. *James Thompson & Co.*, 208 F. 2d 743, 747, 748 (C.A. 2); *National Labor Relations Board* v. *Perfect Circle Co.*, 162 F. 2d 566, 573 (C.A. 7); *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board*, 162 F. 2d 435, 440 (C.A. 7); *Kansas City P. & L. Co.* v. *National Labor Relations Board*, 111 F. 2d 340, 346-347 (C.A. 8); *Salt River Valley Assn.* v. *National Labor Relations Board*, 206 F. 2d 325, 329 (C.A. 9).

ing review.[8] Moreover, the finding has overwhelming support in the record, which establishes that petitioner knew the Union represented 14 of the 18 employees in the bargaining unit (see pp. 6-8, *supra*). Cf. *National Labor Relations Board* v. *Harris-Woodson Co.*, 179 F. 2d 720, 723 (C.A. 4); *National Labor Relations Board* v. *National Seal Corp.*, 127 F. 2d 776, 778 (C.A. 2).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1955.

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[8] Both the *Jackson Press* and *James Thompson* cases, with which petitioner claims conflict (Pet. 23), turn on the substantiality of the evidence to support the "bad faith" findings in those cases. See 201 F. 2d at 544-545; 208 F. 2d at 745-746.

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